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ASBESTOS ABATEMENT: THE ALLOCATION OF LIABILITY

I. PROFILE OF THE ASBESTOS PROBLEM

Each day in the United States an estimated fifteen million children attend school in approximately thirty-one thousand buildings that have asbestos-containing materials (ACM).¹ In South Carolina alone, between three to four thousand state-owned buildings contain ACM.² All told, the Environmental Protection Agency (EPA) has concluded that one out of five public and commercial buildings in the United States contains asbestos that can be crushed or damaged with simple hand pressure.³

Ever since the Greeks in the first century noticed a "sickness of the lungs" in slaves who weaved asbestos into cloth,⁴ the ill-effects of asbestos on those who work in and around it have been studied to some degree. Asbestos was "rediscovered" by the western world during the industrial revolution in the eighteenth century and was used extensively as insulation for high-temperature equipment. By the 1920s physicians in England had diagnosed asbestosis as a cause of death in asbestos mill workers.⁵ By the mid-1930s numerous studies, medical researchers, insurance companies, and the United States federal government

1. See *Asbestos cleanup companies face license standards*, The State (South Carolina), Dec. 18, 1987, at B2, col. 4.

2. See *id.* at A15. In the State of South Carolina's lawsuit against 93 asbestos manufacturers, the State alleged that more than 3,000 state-owned buildings contained asbestos. By August 1988 over 900 had been positively identified, and the state's attorneys estimated that the final figure may reach as high as 4,000. These figures do not include buildings in the state universities, which also have filed suits in both state and federal court. Interview with Deborah K. Neese, attorney with the South Carolina Attorney General's Office — Asbestos Division (Aug. 4, 1988).

3. See *EPA rejects national asbestos cleanup*, The State (South Carolina), Mar. 1, 1988, at A15, col. 1; see also EPA, *Asbestos in Buildings: A National Survey of Asbestos-Containing Friable Materials* (1984).

4. See Brodeur, *Annals of Law - Asbestos Industry on Trial — A Failure to Warn*, THE NEW YORKER, June 10, 1985, at 49, 57.

5. See Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, BRIT. MED. J., July 26, 1924, at 147.

identified potential health hazards of asbestos.⁶ Nevertheless, while the first published suggestion of an association between asbestos and malignant disease (cancer) was made in 1935,⁷ as late as 1968 few people had any idea that inhaling asbestos fibers could be dangerous. In that year, *The New Yorker* magazine reported that kindergartens in several states used raw asbestos dust in arts and crafts class and that certain surgeons advocated sprinkling asbestos on surgical incisions to promote adhesion and healing.⁸

In 1933 the Johns-Manville Corporation board of directors authorized its president to pay \$30,000 to settle cases brought against the corporation by eleven former employees who had asbestosis.⁹ Manville did not need to settle another asbestos claim, however, until thirty-five years later.¹⁰ In 1972 the Fifth Circuit Court of Appeals decision of *Borel v. Fibreboard Paper Products Corp.*¹¹ started the beginning of a flood of asbestos personal injury suits. *Borel* upheld a jury award of \$79,000 to the widow of an insulation worker whose death was linked to prolonged exposure to asbestos.¹²

Today, asbestos-related suits against asbestos-product manufacturers are being filed in ever-increasing numbers. By August 26, 1982, the Johns-Manville Corporation reported that it was involved in approximately 11,000 asbestos health claims, which included over 15,000 individual plaintiffs in numerous jurisdic-

6. See, e.g., Dressen, Dallavalle, Edwards, Miller, Sayers, Easom & Trice, *A Study of Asbestosis in the Asbestos Textile Industry*, PUB. HEALTH BULL. No. 241, U.S. Gov't Printing Office, Washington, D.C. (1938); Fulton, Dooley, Matthews & Houtz, *Asbestosis Part III: The Effects of Exposure to Dust Encountered in Asbestos Fabricating Plants on the Health of a Group of Workers*, DEPARTMENT LAB. INDUS., PA. BUREAU INDUS. STANDARDS, (Harrisburg, Pa.), Spec. No. 42 (1935); Lanza, McConnell & Fehnel, *Effects of the Inhalation of Asbestos Dust on the Lungs of Asbestos Workers*, 50 PUB. HEALTH REP. 1, 1-12 (1935).

7. See Lynch & Smith, *Pulmonary Asbestosis III: Carcinoma of Lung in Asbestos - Silicosis*, 24 AM. J. CANCER 56 (1935).

8. See Brodeur, *The Magic Mineral*, THE NEW YORKER, Oct. 12, 1968, at 117, 161-62.

9. See Brodeur, *supra* note 4, at 64.

10. See *id.* In 1968 Johns-Manville, along with four other named defendants, settled a case brought by Claude Tomplait, an asbestos insulator suffering from asbestosis. Of the named defendants, only Fibreboard Paper Products Corp. refused to settle and eventually lost at trial. See *id.* at 74.

11. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

12. See *id.* at 1081.

tions throughout the United States.¹³ In 1988 the United States General Accounting Office (GAO) reported that over 20,000 asbestos-related suits were pending in federal courts at the end of fiscal year 1987, more than triple the figure from the end of fiscal year 1983.¹⁴ Additionally, the GAO has estimated that by 1990 the federal courts' administrative office will spend \$20,900,000 to process asbestos cases. While the number of cases do not appear overwhelming, asbestos cases frequently involve multiple claims filed together for efficiency. Moreover, asbestos cases require a disproportionate amount of judicial resources compared to other civil cases.¹⁵

II. THE SECOND WAVE OF ASBESTOS LITIGATION

A. *Recognition of the Problem*

Ever since the 1930s United States corporations involved in mining and manufacturing asbestos have known that breathing the substance may cause a potentially fatal pneumoconiosis.¹⁶ The asbestos industry initiated several studies of asbestos mines and factories.¹⁷ Despite negative findings in these studies and others, the industry failed to acknowledge the severity of danger. Additionally, some evidence shows that similar studies conducted by other groups, including contractors, were either withheld from publication or published in a misleading form.¹⁸

The failure of the industry and the public to recognize the dangerous side effects of asbestos aided its dramatic increase in use in the United States. Between 1932 and 1974 asbestos consumption rose from approximately 100,000 to nearly 800,000 metric tons.¹⁹ Asbestos was used widely in the production of insulation, textile, brakes, tobacco products, dish towels, table salt,

13. See Affidavit of James F. Beasley, *In re Johns-Manville Corp.*, 26 Bankr. 420 (Bankr. S.D.N.Y. 1983).

14. See Prod. Safety & Liab. Rep. (BNA) ¶ 680 (July 15, 1988). The pending cases increased from 5,885 at the end of 1983 to 20,278 at the end of 1987.

15. See D. HENSLER, W. FELSTINER, M. SELVIN, & P. EBENER, ASBESTOS IN THE COURTS, THE CHALLENGE OF MASS TOXIC TORTS 24 (1985) [hereinafter D. HENSLER].

16. See sources cited *supra* note 6.

17. See Lanza, McConnell & Fehnel, *supra* note 6.

18. See B. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 608 (2d ed. 1986).

19. See *id.* at 614.

water pipes, hair dryers, and even intravenous drugs.²⁰ Virtually every American was exposed to some form of the mineral.

Unlike yesteryear when asbestos manufacturing workers and construction workers faced the greatest risk of ACM exposure, maintenance workers today face the greatest threat of ACM exposure because of their proximity to asbestos thermal insulation.²¹ Another group at risk are the occupants of buildings that have deteriorating asbestos ceilings, fireproofings, and air plenums. Building owners, increasingly more aware of their potential liability to occupants and workers, are facing the enormous expense of asbestos removal by speciality contractors. Awareness of potential personal liability actions against owners, administrators, and management, in addition to a concern for the health of occupants and employees, has served to speed up removal and abatement procedures. The roadblock to asbestos abatement no longer is ignorance but the high cost of proper asbestos management.

B. Asbestos in the Schools

The asbestos-in-buildings issue has been a focus of public attention for several years. In particular, asbestos in schools has been an area of concern. By 1984 numerous state legislatures and regulatory agencies were beginning to take action and pass asbestos-related laws.²² In the years 1982 and 1984, Congress took action by passing two statutes that dealt specifically with the issue of asbestos in schools.²³ The EPA also began to take action due to public pressure and Congressional mandate.²⁴

In 1983 the EPA published the "Asbestos-in-Schools"

20. See EPA, *Proceedings of the National Workshop on Substitutes for Asbestos*, July 14-16, 1980 (1981).

21. See, e.g., Destephano, *Plant Designed Grinder Makes Usuable Material From Scrap*, S. POWER & INDUS., June 1960, at 35.

22. See ASBESTOS ABATEMENT: RISKS AND RESPONSIBILITIES, SPECIAL REPORT (BNA), at 104-161 (1987) [hereinafter ASBESTOS ABATEMENT].

23. See Asbestos School Hazard Detection and Control Act of 1980 (codified at 20 U.S.C. §§ 3601-3611 (1982)); Asbestos School Hazard Abatement Act of 1984 (codified at 20 U.S.C. §§ 4011-4021 (Supp. II 1984)).

24. See Response to Citizens Petition on Asbestos, Public Meeting, 49 Fed. Reg. 15,094 (1984); Asbestos, Response to Citizens Petition on Asbestos, 49 Fed. Reg. 8450 (1984).

rule,²⁵ which required schools to identify friable asbestos, test the air, and notify employees and parent-teacher groups of their findings by June 1983. Despite these requirements, the EPA failed to supply any precise data or advice concerning the repair or removal of ACM. Further, the EPA declined to say what ambient concentrations of asbestos posed a danger to teachers and students. As a result, many school administrators failed to perceive a danger in their schools and by the end of 1986, only sixty percent had complied with the asbestos-in-schools regulation.²⁶

Many other school districts sought to abate the asbestos in their buildings by hiring inexperienced and untrained asbestos-removal firms. Unqualified firms often were unable to cure the asbestos problem and, in some cases, actually may have increased the danger to the occupants.²⁷ In an attempt "to right this highly confused and potentially dangerous state of affairs,"²⁸ Congress passed the Asbestos Hazard Emergency Response Act of 1986 (AHERA).²⁹ The Act ordered the EPA to issue regulations within 360 days governing school inspections and response actions. By the time AHERA was passed, more than 300 school districts already had filed suit in both federal and state courts against the manufacturers and suppliers of ACM.³⁰

The school districts' continued noncompliance with asbestos inspection, reporting, and abatement regulations is a serious matter that may expose both school districts and officials to liability.³¹ Moreover, school administrators who discover asbestos in their buildings and fail to take action or notify employees and parents may face tort liability. Because a knowing failure to warn arguably is "intentional," some administrators may not be

25. See C. HARVEY & M. ROLLINSON, *A Guide For School Administrators, Teachers, and Parents*, in ASBESTOS IN THE SCHOOLS 5 (1987).

26. See *id.*

27. See Fried, *Asbestos Abatement: A Pragmatic Survey of Problems and Solutions*, in ASBESTOS: REGULATION, REMOVAL AND PROHIBITION, LITIGATION SOURCE HANDBOOK SERIES No. 322, at 118-20 (1987).

28. *Safe Bldgs. Alliance v. EPA*, 846 F.2d 79, 80 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 366 (1988).

29. Pub. L. No. 99-519, 100 Stat. 2970 (codified at 15 U.S.C. §§ 2641-2654 (Supp. IV 1986)).

30. See *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986).

31. See RESTATEMENT (SECOND) OF TORTS § 343 (1966).

able to assert a sovereign immunity defense.³²

The general awareness of the asbestos danger should encourage school officials to take action when asbestos is found. Administrators, however, should be aware that even licensed, bonded, and insured asbestos contractors may do a “dirty job” and further contaminate schools. Properly conducted and supervised asbestos abatement is the only method by which school districts and administrators may avoid legal liability.

C. Commercial Buildings

1. Problems Associated with the Lease and Sale of Asbestos-Contaminated Buildings

Responsibility for identifying the presence of asbestos, determining whether the ACMs are hazardous, and initiating abatement procedures, rests with building owners.³³ Building users may sue building owners to force them to remove asbestos.³⁴ Due to the current state of the law and the costs involved with asbestos abatement, a tremendous amount of litigation potentially may arise between building owners and building users.³⁵

Another potential for litigation lies in the responsibilities of previous owners to current owners and current owners to potential buyers. Included in these classes are the real estate brokers

32. Under 42 U.S.C. § 1983 (1982), a plaintiff may sue a public official who, under color of state law, causes “deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States].” *Id.* Governmental immunity has been rejected by a number of courts in recent years. *See, e.g.,* *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal.Rptr. 1 (1978).

33. *See* Fried, *supra* note 27, at 120 (citing U.S. Attorney General’s Asbestos Liability Report).

34. Yet under the Occupational Safety and Health Act (OSHA), tenants who are employers also have a responsibility for asbestos control. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, 654 (1982). Additionally, if the tenant-employer initiates any change in condition of the asbestos, he may be responsible for its control. *See* W. PROSSER, *THE HANDBOOK OF THE LAW OF TORTS*, § 102 at 668-69, (4th ed. 1971). *But see* *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E. 2d 173 (1969) (intervening negligence of a third person will not relieve original wrongdoer of responsibility if intervention should have been foreseen).

35. *See* *Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987) (City of Greenville was ordered to remove asbestos and, in turn, sued the supplier for the cost of removal).

and lending institutions involved in the sales who themselves may owe certain duties and obligations. Numerous possible claims also could be brought against the seller of an asbestos-contaminated building. In South Carolina, for instance, a plaintiff might allege a claim under strict liability.³⁶ South Carolina courts have held that a manufacturer or assembler has a duty to test and inspect the components incorporated into its product.³⁷ The definition of "product" has been expanded to include the sale of a house.³⁸ Additionally, some courts, both in and outside of South Carolina, have applied the doctrine of strict liability to sales-service hybrid transactions. Arguably, a contractor's installation of a product is such a transaction.³⁹ By categorizing a house — and logically a commercial building — as a product, many of those involved in the sale of a "defective" building might be liable to the buyer under the doctrine of strict liability.⁴⁰ The contractor and subcontractor who installed the asbestos also are potentially liable under a sales-service hybrid transaction theory.

Commercial building owners who fail to disclose the presence of asbestos contamination in the sale or lease of their buildings also may be liable under a theory of "passive" concealment.⁴¹ The theory of passive concealment most typically has been applied to the sale of residential property since these buyers are considered less sophisticated.⁴²

36. For a discussion of the South Carolina strict liability statute, S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976), see Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976).

37. See *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986) (citing *Nelson v. Coleman Co.*, 249 S.C. 652, 155 S.E.2d 917 (1967)); see also *Torts, Annual Survey of South Carolina Law*, 34 S.C.L. REV. 243 (1982).

38. See *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 501, 229 S.E.2d 728, 730 (1976).

39. See, e.g., *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826 (Minn. 1977) (subcontractor supplied and installed floor furnace that injured plaintiff); *Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971) (contractor liable for installation of defective gas fitting in course of remodeling home); *DeLoach v. Whitney*, 275 S.C. 543, 273 S.E.2d 768 (1981).

40. See RESTATEMENT (SECOND) OF TORTS § 402A (1966) (adopted in South Carolina under S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976)).

41. See RESTATEMENT (SECOND) OF TORTS § 353 (1965).

42. South Carolina implicitly has recognized that one-time sellers of goods have a duty to warn buyers about known dangers of which they know or have reason to know. See *Lane v. Trenholm Bldg. Co.*, 267 S.C. at 503-504, 229 S.E.2d at 731. The same basic principles of failure to warn were applied in personal injury suits against asbestos manufacturers. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert.*

Some passive concealment jurisdictions might require commercial building owners to disclose the presence of asbestos to potential purchasers and tenants.⁴³ A claim against the seller might be improved because of the current magnitude of publicity and regulations concerning asbestos.⁴⁴ Furthermore, even if a building owner is successful in using an ignorance defense, the buyer of an asbestos-contaminated building might void the sale under a theory of mutual mistake. A mutual mistake argument might be successful even if the contract contains an “as is” clause.⁴⁵

In addition to the sellers’ and lessors’ liability, real estate brokers who participate in the sale of an ACM-contaminated building may incur liability. Arguably, brokers have a duty to determine whether the property they are selling is contaminated with asbestos. Liability may exist under either a negligence⁴⁶ or an implied warranty of habitability theory.⁴⁷

Although no sound theory of liability is applicable against lending institutions, they nevertheless impact the asbestos abatement problem. Due to the ever-increasing costs and responsibilities associated with abatement and disposal of ACM, most lending institutions refuse to lend on a building containing asbestos, and some will not lend on buildings that ever contained it.⁴⁸

The shrewd building owner may attempt to avoid a disclosure duty by use of a “hazardous substances on the premises” disclaimer clause. Nevertheless, due to the steadily increasing number of lending institutions and real estate firms that require environmental assessments prior to the sale of commercial prop-

denied, 419 U.S. 869 (1974).

43. See Wolfe, *Asbestos Warning: Commercial Building Owners Beware*, 67 MICH. BAR J., No. 3, at 244 (1988) (analysis of passive concealment theory under Michigan law).

44. Building owners, however, probably could not make a credible claim of ignorance of the asbestos problems in their buildings. See *supra* text accompanying notes 21-23.

45. See Wolfe, *supra* note 43, at 246-47.

46. See *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (broker owes duty under a negligence theory to inspect premises).

47. Cf. *Holder v. Haskett*, 283 S.C. 247, 321 S.E.2d 192 (Ct. App. 1984) (real estate agent may be liable under implied warranty of habitability theory if party to contract). Attorneys should consider including a disclaimer clause in purchase agreements, rather than an “as is” clause.

48. See *Looking for Trouble*, *The State* (South Carolina), Sept. 12, 1988 (Business South Carolina Magazine), at 9.

erty,⁴⁹ disclaimer clauses may not escape the scrutiny of buyers or their agents. Instead of a disclaimer clause, buyers might attempt to insert a clause under which the seller guarantees a building free of asbestos or other hazardous substances. Asbestos evaluations may become a routine part of the due-diligence determination made prior to a commercial building transaction.⁵⁰

2. *Allocation of Liability: Planning for Cost-Recovery Actions*

In 1982 when Johns-Manville filed for reorganization under Chapter 11 of the Bankruptcy Code,⁵¹ it signaled the beginning of a new era in asbestos litigation. The Manville suit attracted wide publicity and heightened public knowledge and concern over both the danger of exposure to asbestos and the complexities of the legal aspects of recovery. New theories of liability based on potential injury due to exposure created the second wave of asbestos law suits — the property damage claim. Plaintiffs in property damage claims typically sought recovery for the cost of inspecting and abating asbestos contamination in their buildings.⁵² School districts,⁵³ cities,⁵⁴ and states⁵⁵ led the way by attempting to compel the asbestos manufacturers to pay the abatement costs.

Since the primary responsibility for asbestos identification

49. See *id.* at 8.

50. See Wolfe, *supra* note 43, at 247.

51. On August 26, 1982, Johns-Manville and its parent, Manville Corporation, filed voluntary petitions in the United States Bankruptcy Court for the Southern District of New York for reorganization under Chapter 11 of the Bankruptcy Code, Case Nos. 82B 11656-11676 (B.L.).

52. See NSBA COUNCIL OF SCHOOL ATTORNEYS, UNCOVERING THE ASBESTOS HAZARD, at Tab 10 (1983) (example of standard complaint used by school districts in asbestos property damage claim against asbestos manufacturer).

53. See, e.g., Spartanburg County School Dist. Seven v. National Gypsum Co., No. 83-1744-14 (D.S.C. filed July 26, 1983); Lexington County School Dist. Five v. United States Gypsum, No. 82-2072-0 (D.S.C. filed Aug. 17, 1982); Spartanburg County School Dist. Six v. National Gypsum Co., No. 83-CP-42-1756 (S.C. Cir. Ct. Aug. 2, 1984).

54. See, e.g., Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987).

55. Suits have been filed by the states of Maryland, Illinois, West Virginia and South Carolina against asbestos manufacturers, and these currently are awaiting trial. See Interview with Deborah K. Neese, *supra* note 2.

and abatement rests with building owners,⁵⁶ they must develop and implement a plan of action. As an important part of any such plan, owners should seek competent legal counsel to learn what steps must be taken to ensure that any potential cost recovery rights are not forfeited. Additionally, they must act to minimize their own potential liability and develop a defensive strategy for any potential legal actions. The most important strategy for owners is to keep complete documentation of existing conditions of hazardous assessment actions and of corrective actions they have taken.⁵⁷

In assessing the best method for appropriate record keeping, the threshold question may be whether any records should be kept at all. Some owners, upon discovering asbestos in their buildings, may fail to make prompt disclosure or keep adequate documentation under the fear that records could be legally incriminating. Management of an asbestos-abatement program, however, is different from most project management activities. History has shown that the inspection, isolation, enclosure, and removal of ACM may take several years to accomplish.⁵⁸ In addition, failure to keep records adequately may weaken a liability defense. Without good records, the defendant may be unable to refresh memories and provide supporting evidence.⁵⁹

III. POTENTIAL LIABILITY OF "PERSONS" OTHER THAN THE MANUFACTURERS

To date, almost all of the suits by asbestos victims, both for personal injury and property damage, have been brought against the ACM manufacturers. Today, ACM manufacturers might not provide the deep pocket they did formerly.⁶⁰ Actions against

56. See Fried, *supra* note 27 and accompanying text.

57. See Fox, *The Owners Responsibility*, 27 ASBESTOS ABATEMENT, 30 (1986).

58. See *id.*

59. See G. PETERS & B. PETERS, 3 SOURCEBOOK ON ASBESTOS DISEASES: MEDICAL, LEGAL AND ENGINEERING ASPECTS 61 (1988).

60. First, some manufacturers' assets are tied up in bankruptcy. See *supra* note 51; see also The State (South Carolina), Apr. 12, 1988, at D6 (Manville has constructed a separate warehouse to store the millions of documents pertaining to asbestos-related claims against them). Second, there is a backlog of federal asbestos cases. See D. HENSLEY, *supra* note 15. Third, repetitious punitive damages awards are drying up manufacturers' assets. See, e.g., *Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987) (upholding an award of two million dollars in punitive damages); *In re School Asbestos*

parties other than manufacturers are worth exploring.

For used buildings, a cause of action may exist against both the prior owner and the real estate broker from whom the building was purchased.⁶¹ Tort liability may exist if the prior owners or real estate agent was passively or secondarily negligent in causing injury to some third person due to their failure to discover and warn of the danger. The secondarily negligent parties, as well as the manufacturers, may be liable to third persons.⁶² The visibility and financial status of prior owners and real estate brokers may make them attractive defendants.

A. Distributors/Material Suppliers

While as a general rule distributors are not liable for latent defects in products sold in sealed packages or containers, they are required to exercise reasonable care to prevent injury from known dangers. In such circumstances, distributors must transmit proper warnings and instructions.⁶³ Liability for products

Litigation, 789 F.2d 996, 1001 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986); *see also* Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania; Punishment or Annihilation*, 87 DICK. L. REV. 265 (1983).

61. *See supra* text accompanying notes 36-50. A creative cross-claim for the owner, who himself is made a defendant, may lie in the law of indemnity. Indemnity could remove any statute of limitations or repose problems that exist in some jurisdictions. *See* C. HARVEY & M. ROLLISON, *supra* note 25, at 55-56.

62. *See* RESTATEMENT OF RESTITUTION §§ 93, 95 (1936); *see also* St. Louis-San Francisco Ry. v. United States, 187 F.2d 925 (5th Cir. 1951); *Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974). Even so, because these two parties are not *in pari delicto*, the one who was passively negligent may maintain an action for indemnity against the actively negligent party.

The usefulness of an indemnity claim rests partially on whether or not the jurisdiction in which it is raised has adopted comparative fault. In such a forum a passively negligent supplier or installer is not entitled to 100% indemnity from a negligent manufacturer. *See* Tolbert v. Gerber Indus., 255 N.W.2d 362 (Minn. 1977). Therefore, any time building owners, contractors, or suppliers are sued because asbestos is present, they may escape liability by asserting that the manufacturers must indemnify them. *See* Weber v. Johns-Manville Corp., 630 F. Supp. 285 (D.N.J. 1986); *Prod. Liab. Rep. (CCH)* ¶ 183 (Dec. 1987). The probable success of such an indemnification claim is limited by the reality that owners and contractors commonly will not be named as defendants if the manufacturers are both identifiable and liquid. Owners and contractors may have been as unaware as the plaintiffs as to the dangers of asbestos. *But see* B. CASTLEMAN, *supra* note 18; *Technology: Spray Fireproofing Faces Controls or Ban as Research Links Asbestos to Cancer*, 133 ARCHITECTURAL F. 50 (1970).

63. *See* 2A L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 6.12[4][C] (1988). *But see* *Pierce v. Liberty Furniture Co.*, 141 Ga. App. 175, 233 S.E.2d 33 (1977) (passage of UCC had the effect of eliminating sealed container doctrine for breach of warranty).

with latent defects normally will be imposed on distributors under either a breach of warranty theory, when there is privity of contract,⁶⁴ or a strict liability in tort theory.⁶⁵

The chief difficulty of asserting claims made against vendors of asbestos, when the vendor is not a subsidiary of the manufacturer, is that the plaintiff may be required to show that the distributor had actual or constructive knowledge of the defect in the product. Distributors are required only to exercise reasonable care to prevent injury from “known” dangers.⁶⁶ If one accepts the “conspiracy of silence” claim commonly made against manufacturers, this requisite knowledge would be very difficult to prove. Although distributors should have had knowledge of the dangerous propensities of ACM after 1964 to 1970,⁶⁷ the primary responsibility to warn consumers of this danger remained with the manufacturer.⁶⁸ Only if the distributor assumed liability by holding the asbestos products out to the public as his own, or if the plaintiff can show asbestos to be “unreasonably dangerous,” can the distributor’s knowledge of its dangerous qualities be presumed.⁶⁹

Certain jurisdictions, however, have strictly construed the comments to the *Restatement of Torts*, holding that Rule 402A “applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor.”⁷⁰ Courts in these jurisdictions reason that distributors may seek indemnity from the manufacturer responsible for creating the defective condition.⁷¹

64. See 2A L. FRUMER & M. FRIEDMAN, *supra* note 63, §§ 19.03 (4)(c), 20.04 (1).

65. See RESTATEMENT (SECOND) OF TORTS § 402A (1966).

66. See 2A L. FRUMER & M. FRIEDMAN, *supra* note 63.

67. See B. CASTLEMAN, *supra* note 18, at 298. In 1964 Johns-Manville began using warning labels on asbestos insulation products, and by 1970 labels were attached to other asbestos products such as sacks of fiber, cement, and brake linings.

68. See *Borel v. Fibreboard Paper Prods., Inc.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

69. R. KERRIGAN & V. STILWELL, *How Do I Avoid Liability From Mistakes in Shop Drawings and Defects in Products Described in Brochures, Manufacturer's Specifications and By Samples?*, in AVOIDING LIABILITY IN ARCHITECTURE, DESIGN, AND CONSTRUCTION 211 (1983).

70. RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965).

71. See, e.g., *Bryan v. John Bean Div. of F.M.C. Corp.*, 566 F.2d 541, 544 (5th Cir. 1978); *Duncan v. Cessna Aircraft Corp.*, 665 S.W.2d 414, 432 (Tex. 1984) (mere conduit of defective products may seek indemnification from manufacturer).

B. Architects and Engineers

Design professionals generally are not held to a strict liability standard for defective products. Nevertheless, liability can attach to design professionals for mistaken or careless approval of defective products when the defect was ascertainable by reasonable investigation.⁷² Both architects and engineers are required to exercise the ordinary skill and diligence of their profession in preparing plans and specifications, and they must guard against defects as to materials and construction.⁷³

Absent a special agreement, a design professional does not implicitly warrant that his design will accomplish the desired result.⁷⁴ Therefore, the liability of a design professional may turn on the extent to which the use of asbestos was considered an accepted practice by like professionals.⁷⁵ Although acceptance of the completed structure by the owner may be considered *prima facie* evidence that the project was completed in a workmanlike manner, it does not constitute a waiver of claims for latent defects caused by deficient or defective plans and workmanship not discoverable by simple inspection.⁷⁶

C. Real Estate Brokers

As previously discussed, some authority supports the claim that real estate brokers and agents have a duty to investigate and disclose latent defects in properties that they sell.⁷⁷ While a claim against a broker normally will arise in the sale of a used

72. See R. KERRIGAN & V. STILWELL, *supra* note 69, at 219.

73. See *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963); *Miller v. De Witt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

74. See, e.g., *City of Mounds View v. Waljarvi*, 263 N.W.2d 420 (Minn. 1978); *Milau Assocs., Inc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247, 398 N.Y.S.2d 882 (1977). *But see* *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951) (design professional held to impliedly warrant that structure will be reasonably fit for its intended use); *Avent v. Proffitt*, 109 S.C. 48, 95 S.E. 134 (1918) (architect liable for failure to discover and condemn defective plastering in house erected under his supervision).

75. In December 1970 a prominent architectural publication carried an article that discussed the health hazards of asbestos and the problems that the construction industry was experiencing in complying with regulations concerning the use of asbestos. See *Spray Fireproofing Faces Control or Ban as Research Links Asbestos to Cancer*, 133 ARCHITECTURAL F. 50 (1970).

76. See UNCOVERING THE ASBESTOS HAZARD, *supra* note 52.

77. See *supra* notes 46 & 47 and accompanying text.

building containing asbestos, the owner of a newly purchased structure also may allege misrepresentation.⁷⁸

Two landmark 1984 decisions, *Easton v. Strassburger*⁷⁹ in California and *Gouveia v. Citicorp Person-to-Person Financial Center, Inc.*⁸⁰ in New Mexico, may have created a strict responsibility on the part of real estate representatives toward purchasers. Under these cases, a broker has a duty to investigate any "red flags" that indicate latent defects, and he cannot make misrepresentations with respect to known or discoverable defects. This is true even when there is no direct contact between the purchaser and the broker prior to the sale.⁸¹

In the not too distant past, the *caveat emptor* standard protected realtors from liability for innocent misrepresentation and latent defects. While *caveat emptor* is still followed in many states, state courts increasingly have imposed liability on real estate brokers for any kind of misrepresentation.⁸² Section 551(c)(1) of the *Restatement of Torts* states that a building purchaser may seek restitution for any loss caused by justifiable reliance on an innocent misrepresentation.⁸³ Thus, one who purchases a building containing asbestos based on a realtor's assurance that the building is in "top shape," or some such similar claim, may have a cause of action against the realtor. To date, no South Carolina court has considered such a claim; however, one may infer from South Carolina's acceptance of the doctrine of *caveat venditor*⁸⁴ that liability may be extended to a realtor as the vendor of a building.

As a precaution to liability for negligent or innocent misrepresentations made to purchasers regarding the presence of ACM

78. Brokers have been found liable for a variety of misrepresentations concerning both real property and new homes. See, e.g., *Loch Ridge Constr. Co. v. Barra*, 291 Ala. 312, 280 So. 2d 745 (1973); see also *Gauerke v. Rozga*, 112 Wis. 2d 271, 332 N.W.2d 804 (1983) (holding that brokers are strictly responsible for any representations).

79. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

80. 101 N.M. 572, 686 P.2d 262 (Ct. App. 1984).

81. See *Treece & Clawson, The Real Estate Broker's Duty to Investigate*, FOR THE DEFENSE, May 1988 at 11.

82. See, e.g., *Hoffman v. Connall*, 108 Wash. 2d 69, 77-78, 736 P.2d 242, 247 (1987) (Bore, J., dissenting).

83. See RESTATEMENT (SECOND) OF TORTS § 551(c)(1) (1977).

84. The vendor is liable for defective buildings in the sale of a home between an innocent purchaser and a vendor who places the building in the stream of commerce. See *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976); see also *infra* note 108 and accompanying text.

in a building, real estate brokers and agents should not make representations unless they are certain of the truth of the information. Further, any representations made to a purchaser should not be represented as being based on the broker's own knowledge. Additionally, attorneys should consider advising realtors to draft contracts that include a disclaimer clause concerning the presence of any toxic substances, in addition to the more common "as is" clause.⁸⁵

Moreover, brokers cannot escape liability through silence or nondisclosure. If realtors intentionally withhold information from purchasers who rely on the nondisclosures to their detriment, the realtor's action constitutes intentional fraud. In *Roberts v. Estate of Barbagallo*⁸⁶ a broker followed a policy of non-disclosure regarding the presence of ureaformaldehyde foam insulation (UFFI) in his listed houses. The broker knew that this type of insulation creates a potential health hazard, but mentioned nothing to the purchaser about its presence in the house. After purchasing the house, the plaintiff-buyer discovered it contained UFFI and sued to rescind the sale contract. As a result of the broker's fraudulent concealment of a material fact, the Pennsylvania court granted rescission.⁸⁷

D. Contractor and Subcontractor

Generally, absent specific contract provisions, a contractor's obligations end when the structure is completed and the owner has accepted the work.⁸⁸ In addition, when construction materials contain latent defects, some courts hold that the contractor is not liable for injury to the structure caused by the defect.⁸⁹

Courts also have found that contractors operate under certain implied warranties. Some of the most commonly found implied warranties include the following: 1) that materials supplied

85. See *supra* text accompanying note 45.

86. 366 Pa. Super. 559, 531 A.2d 1125 (1987).

87. See *id.* at 573, 531 A.2d at 1132.

88. See 13 AM. JUR. 2D *Building and Construction Contracts* § 27 (1964 & Supp. 1988).

89. See *id.* § 27. See generally Annotation, *Liability of Builder or Subcontractor for Insufficiency of Building Resulting from Latent Defects in Materials Used*, 61 A.L.R.3d 792 (1975) (no contract or tort liability for latent defects that escape a reasonable inspection).

will be of good quality; 2) that the construction will be done in a workmanlike manner and in accordance with good usage and accepted trade practices; 3) that the resulting structure will be merchantable — a structure that passes in the trade without objection; 4) that the contractor services will be fit or suitable for their intended purpose; and 5) that the resulting building will be in compliance with local building codes and will be suitable for the use for which the structure was intended.⁹⁰ Most states, including South Carolina, imply at least one of the above.⁹¹

As late as the last century the generally accepted rule was that builders made no implied warranties against latent defects in the materials used in construction.⁹² The implied warranty that construction materials will be of good quality and free from latent defects has emerged only recently.⁹³ Cases between owners and contractors that install ACM in structures might be a forum for further judicial expansion of the implied warranty of quality for construction materials. This implied warranty theory may be the only method of redress for an owner if the supplier or manufacturer of ACM cannot be reached.

Implied warranties that the construction will be done in a workmanlike manner and that the work is fit for the intended purpose often exist in tandem. South Carolina has accepted both theories in the sale of new homes.⁹⁴ In *Terlinde v. Neely*⁹⁵ the

90. See 4 Constr. Law (MB) ¶ 18.03 (1988).

91. See Note, *Implied Warranties in Home Construction: Subsequent Purchasers*, 33 S.C.L. Rev. 33 (1981); see also *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970). *Accord* *Hefler v. Wright*, 121 Ill. App. 3d 739, 460 N.E.2d 118 (1984); *McDonald v. Miannecki*, 79 N.J. 275, 398 A.2d 1283 (1979); *Air Heaters, Inc. v. Johnson Elec., Inc.*, 258 N.W.2d 649 (N.D. 1977).

92. See, e.g., *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329, 334-35, 69 N.W. 1091, 1092 (1897).

93. In *Clark v. Campbell*, 492 S.W.2d 7, 10 (Mo. Ct. App. 1973), a Missouri court held that it was error to instruct a jury that if a defect in materials was found to be latent, the owner could not recover against the contractor. See *Kubby v. Crescent Steel*, 105 Ariz. 459, 460, 466 P.2d 753, 754 (1970); *Wawak v. Stewart*, 247 Ark. 1093, 1096-97, 449 S.W.2d 922, 926-27 (1970). But see *Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc.*, 235 So. 2d 548, 551-52 (Fla. Dist. Ct. App. 1970); *Cantrell v. Woodhill Enters., Inc.*, 273 N.C. 490, 160 S.E.2d 476 (1968).

94. In *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970), the supreme court held that “in the sale of a new house by the builder-vendor there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation.” *Id.* at 414, 175 S.E.2d at 795.

95. 275 S.C. 395, 271 S.E.2d 768 (1980).

South Carolina Supreme Court apparently extended the theories to subsequent purchasers.⁹⁶ In *Arvai v. Shaw*,⁹⁷ however, the court retreated, limiting implied warranties to the sale of new homes. The court failed to hold a custom builder of a home liable when it was not involved in the sale of the home. Instead, the court held that liability exists only for those that placed the home "into the stream of commerce."⁹⁸

After *Arvai* the only parties who may be liable for the sale of a defective home are those who both *build* and *sell* a completed structure (builder-vendors) and those who sell a completed structure built by someone else (vendors). A party who builds a defective structure apparently is not liable for defects under an implied warranty of fitness in South Carolina. This approach recently was echoed by the South Carolina court of appeals decision *Carolina Winds Owners' Association v. Joe Harden Builder, Inc.*⁹⁹ In *Carolina Winds* the court of appeals held that while the vendor of a new home impliedly warrants the house as being free from latent defects that would render it uninhabitable,¹⁰⁰ the general contractor who builds the home is not liable for defects because he is not a party to the initial sale of the building.¹⁰¹ In so holding, the court resurrected the doctrine of privity of contract in new home sales by stating that the owner of a new building has no contractual cause of action against anyone other than those with whom he has contracted if his only claim is for diminution in the building's value.¹⁰² Thus, *Arvai* has been reaffirmed in limiting causes of action for owners of new homes to builder-vendors and vendors.

In *Lane v. Trenholm Building Co.*¹⁰³ the South Carolina Supreme Court extended the category of parties who may be liable for latent defects in new homes by ruling that the law of sales, and not property, controls. Logically, the sale of a commercial

96. See *id.* at 397-99, 271 S.E.2d at 769-70. Under *Terlinde* the only apparent limitations are requirements that the defect is latent and the warranty be extended only for a "reasonable amount of time." *Id.*

97. 289 S.C. 161, 345 S.E.2d 715 (1986).

98. *Id.* at 164, 345 S.E.2d at 717.

99. 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988), *aff'd on rehearing*, No. 25 Davis Adv. Sh. 21 (S.C. Ct. App. Nov. 30, 1988).

100. See *id.* at —, 374 S.E.2d at 899.

101. See *id.* at —, 374 S.E.2d at 900-01.

102. See *id.* at —, 374 S.E.2d at 902.

103. 267 S.C. 497, 229 S.E.2d 728 (1976).

building also should be governed by the law of sales. Any innocent purchaser, unsophisticated in the construction business, therefore, should be protected from latent defects.¹⁰⁴ Although *Lane* expanded liability to include those who were mere vendors, *Arvai* failed to expand the category of defendants to include builders. Rather, the court held that simply building a structure is not enough to trigger an implied warranty.¹⁰⁵

Both *Arvai* and *Carolina Winds* present a paradox when viewed against the policies supporting *Rutledge* and *Lane* — protecting the consuming public. After *Arvai* the party who is often the most culpable in creating structural defects, the builder, usually is not liable under an implied warranty. The paradox of *Arvai* has led to some confusion among both the South Carolina legal community and the construction industry regarding the development of implied warranty. The confusion has been furthered by the court of appeals' decision in *Carolina Winds*, which in practicality has abolished the rule of *caveat venditor* in South Carolina. Hopefully, the South Carolina Supreme Court will clarify the law of implied warranty in the near future. Until such time, however, South Carolina building owners apparently have no redress against contractors who, acting without negligence, install ACM (unless the installer is also the vendor).

Although most states still hold that under a typical construction contract a contractor's warranties run only to those in privity of contract with him,¹⁰⁶ some courts have dispensed with the privity requirement in the same manner that South Carolina appears to have done in *Terlinde*.¹⁰⁷ Subsequent purchasers need an implied warranty for the same reasons as the original owner. While contractors should not be held to a standard of perfection, a purchaser — whether an individual homeowner or a business — who has relied on a contractor's construction knowledge should not be barred from holding that contractor li-

104. See *id.* at 503, 229 S.E.2d at 731.

105. See *Arvai*, 289 S.C. at 164, 345 S.E.2d at 717.

106. See, e.g., *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 572, 378 A.2d 599, 601 (1977); *Stewart v. Gainesville Glass Co.*, 131 Ga. App. 747, 751, 206 S.E.2d 857, 859 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975); *John H. Armbruster & Co. v. Hayden Co.-Builder Developer, Inc.*, 622 S.W.2d 704, 705 (Mo. Ct. App. 1981).

107. See generally *Terlinde v. Neely*, 275 S.C. at 399, 271 S.E.2d at 770 (citing other jurisdictions that had disposed of privity requirement prior to *Terlinde*).

able for latent defects in the building he purchased from him.

Owners also might base claims against contractors on a products liability theory. Even in states that have refused to view the *entire* building as a product, a product liability could arise for the use of asbestos in *part* of a building. For example, some courts hold contractors and subcontractors liable for installation of "individual items" in the building.¹⁰⁸ Although products liability claims by owners against contractors are rare, such a claim would preclude the use of standard contract and warranty defenses since products liability is a tort theory. In a state such as South Carolina where the law of implied warranty is somewhat uncertain, plaintiffs should consider a products liability claim.

IV. ALTERNATE THEORIES OF LIABILITY

There are five theories of liability that plaintiffs or cross-claimants in an asbestos property damage suit may assert when they are unable to identify the particular manufacturer or supplier of the injury-causing asbestos. These five theories are: (1) concert of action; (2) alternative liability; (3) market share liability; (4) enterprise liability; and (5) risk contribution. Of these five theories, concert of action¹⁰⁹ is the most commonly used. Typically, concert of action theories have been asserted in diethylstilbestrol (DES) cases.¹¹⁰

Under the concert of action theory, a plaintiff must prove both a parallel course of conduct among defendant manufacturers and an express or tacit agreement not to test adequately or not to warn of dangers. Proving an agreement between manufacturers is a difficult burden for plaintiffs to meet.¹¹¹ Nevertheless, in *In re Related Asbestos Cases*¹¹² the court denied the defendant's motion for summary judgment when the plaintiffs were found to have met the requirements for a concert of action

108. See 13 AM. JUR. 2D, *supra* note 88, at §§ 18-17.

109. The concert of action theory has been adopted in the RESTATEMENT (SECOND) OF TORTS § 876 (1965).

110. See, e.g., *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589, 595-96 (D.S.C. 1981); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981).

111. See *Mizell*, 526 F. Supp. 589; *Ryan*, 514 F. Supp. 1004.

112. 543 F.Supp. 1152, 1159 (N.D. Cal. 1982).

claim.¹¹³

Market share liability was set forth clearly for the first time in *Sindell v. Abbott Laboratories*¹¹⁴ when the California Supreme Court described this theory as an expansion of the alternative liability theory established in *Summers v. Tice*.¹¹⁵ Although the market share theory has been adopted by very few jurisdictions since *Sindell*, it has been the topic of much discussion among products liability attorneys.¹¹⁶ The reason for so much discussion about both alternate and market share liability is that if either theory is found to apply, a plaintiff only must prove that he was exposed to and injured by a product of the type that each defendant produces, but is not required to prove which defendant was responsible for the product that caused the injury.

Under an alternate liability theory, a plaintiff only must show that he was injured as a proximate result of one of the defendants' wrongdoing; under market share, all that is needed to shift the burden of causation to the defendants is an injury by a product manufactured by the defendants in an identical method. Courts that have accepted a market share theory have reasoned that it is an acceptable theory if the plaintiff ultimately would be able to join manufacturers that comprise a substantial market share of the injury-causing products.¹¹⁷ Additionally, these courts have stated that it is reasonable to measure the likelihood that any of the defendants supplied the offending product¹¹⁸ by the percentage each sold in relation to the entire production of all manufacturers.

Although it is quite obviously an attractive theory for many

113. The plaintiffs introduced into evidence certain minutes of the Asbestos Textile Institute, which was active from 1944 until some time after 1975 and whose membership included Johns-Manville, Raybestos-Manhattan, Amatex, H.K. Porter, Southern Textile, and Unarco Industries. The court allowed the plaintiffs to introduce this and other evidence of concert of action within the meaning ascribed to that term by the California Supreme Court. *See id.* at 1159.

114. 26 Cal. 3d 588, 610-13, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132 (1980).

115. 33 Cal. 2d 80, 86, 199 P.2d 1, 4 (1948).

116. *See* Boydston & Webber, *Whatever Happened to "Market Share" Liability?*, FOR THE DEFENSE 14, June 1987; Boydston & Webber, *The Narrow Scope of Market Share Liability*, FOR THE DEFENSE 23, April 1988.

117. *See, e.g., Sindell*, 26 Cal. 3d at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145.

118. If the plaintiff can identify several or even one of the manufacturers of the injury causing asbestos, most courts will reject a market share claim. *See Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985).

plaintiffs, several recent decisions have exposed the apparent inappropriateness of a market share claim against asbestos manufacturers. First, a plaintiff must be able to present credible evidence that the named defendants represent a "substantial share of the market."¹¹⁹ Second, many courts have prohibited use of the theory on public policy grounds, believing that a policy favoring recovery by an innocent plaintiff does not justify abrogation of the defendants' rights to have a causative link between their tortious acts and the plaintiff's injuries.¹²⁰ Third, due to the great variety of manufacturing methods and percentages of asbestos content and fiber type, the market share requirement of manufacture by identical process is lacking.¹²¹ Finally, the prior absence of Johns-Manville, which was probably the largest asbestos supplier in the world, from any litigation had been cited as undercutting the market share requirement of "presence in the action of a substantial share of the appropriate market."¹²²

Enterprise liability is a hybrid of the concert of action and alternative liability theories and has been applied to only three products: DES, blasting caps, and asbestos. Although enterprise liability often is confused with market share liability, the enterprise theory differs in that each manufacturer may be held liable for all injuries the product caused by virtue of adherence to an industry-wide standard of safety.

The enterprise theory first was adopted in the case of *Hall v. E.I. Du Pont de Nemours & Co.*¹²³ DuPont was shown to have adhered to trade standards regarding the manufacture and design of blasting caps and joint control of risk was shown by industry-wide agreement and cooperation. The plaintiff proved by a preponderance of the evidence that one of the manufacturers had manufactured the injury-causing caps, thus shifting the causation burden of proof to all the defendants.

The enterprise theory as applied to the asbestos industry has been rejected in almost every jurisdiction. In several instances, courts have found plaintiffs unable to show adherence

119. *Marshall v. Celotex Corp.* 651 F. Supp. 389, 393 (E.D. Mich. 1987).

120. *See, e.g., Case v. Fibreboard Corp.*, 743 P.2d 1062 (Okla. 1987).

121. *See In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982); *Goldman v. Johns-Manville Sales Corp.*, 33 Ohio St. 3d 40, 50, 514 N.E.2d 691, 700 (1987).

122. *Goldman*, 33 Ohio St. 3d at 51, 514 N.E.2d at 701.

123. 345 F. Supp. 353 (E.D.N.Y. 1972).

to any industry-wide standard, and several others have found the theory itself repugnant to traditional tort law notions.¹²⁴ Additionally, as with market share, the plaintiff's ability to identify at least one manufacturer whose product caused the injury makes the theory inapplicable.¹²⁵ The only court to adopt the enterprise theory in an asbestos case did so by mistake, having actually adopted the market share theory.¹²⁶

The last theory, risk contribution, first was adopted by the Wisconsin Supreme Court in *Collins v. Eli Lilly Co.*,¹²⁷ another DES case. The only other state that has adopted this theory is California in *Gard v. Raymark Industries*.¹²⁸ Under the risk contribution theory, the plaintiff must allege and prove either negligence or strict liability, but may sue just one manufacturer. Once a prima facie case has been established, the burden shifts to the defendant to implead other defendants or to prove it did not manufacture the product that caused the injury.

Obviously, rules governing the above-mentioned theories are far from being settled and vary greatly from jurisdiction to jurisdiction. While alternative and market share liability theories appear to have become the most popular among asbestos plaintiffs,¹²⁹ courts are reluctant to accept them. Conversely, while the concert theory generally is accepted by most courts, it has been applied in only a handful of asbestos cases.¹³⁰

The newest and least-tested theory, risk contribution, may work in favor of many property damage plaintiffs. If a court can be persuaded to follow the reasoning of the California court in *Gard*, plaintiffs may be able to seek punitive damages from defendants even when they were following government or industry specifications. Moreover, under *Gard* the fact that a plaintiff cannot join other potential defendants, because he has settled with them or because they are bankrupt, does not preclude the

124. See *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983), cert. denied, 465 U.S. 1102 (1983).

125. See *Prelick v. Johns-Manville Corp.*, 531 F. Supp. 96 (W.D. Pa. 1982).

126. See *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), reversed in part on other grounds, 681 F.2d 334 (5th Cir. 1982).

127. 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 469 U.S. 826 (1984).

128. 185 Cal. App. 3d 583, 229 Cal. Rptr. 861 (Ct. App. 1986).

129. See *Boydston & Webber, Whatever Happened to "Market Share" Liability?*, FOR THE DEFENSE 14, 14, April 1988.

130. See *supra* notes 112-114 and accompanying text.

cause of action against the named defendants. Further, it does not preclude shifting the burden of proof to the defendants once the plaintiff proves exposure to the products of one or more of the defendants. Thus, while risk contribution is a relatively untested theory, it may provide a viable alternative for plaintiffs who cannot meet the requirement of the more common theories or who find themselves in a jurisdiction that has rejected them.

V. CLEANUP AND ABATEMENT

A. *Governmental Regulation*

The current federal asbestos control statute covers only schools.¹³¹ When the act was passed, however, some supporters of the law expressed a desire to extend mandatory asbestos response actions to public and commercial buildings.¹³² Perhaps due to the narrow scope of the statute, the EPA has declined to order a nationwide cleanup program that would include buildings other than schools.¹³³ Congress' interest in possibly extending the act to public buildings is evidenced by section 213 of the Asbestos Hazard Emergency Response Act,¹³⁴ which required the EPA to conduct a study of asbestos-containing material in all public buildings.

An EPA survey of ACM, completed in 1986, concluded that 733,000 of the nation's public and commercial buildings contained friable asbestos.¹³⁵ Following release of that report, the EPA stated that it is more important to devote the nation's limited asbestos-removal resources to the 350,000 contaminated schools. The emphasis for ACM-contaminated commercial buildings, the EPA reasoned, should be placed on stopping the improper removal of asbestos, which could increase the level of exposure to the occupants.¹³⁶ In 1988 the EPA proposed a three-

131. See ASBESTOS ABATEMENT, *supra* note 22, at 39.

132. See The Asbestos Hazard Emergency Response Act, Pub. L. No. 99-519, 100 Stat. 2970 (codified at 15 U.S.C. §§ 2641-2654 (Supp. IV 1986)); see also *supra* note 29.

133. See *EPA rejects national asbestos cleanup*, The State (South Carolina), Mar. 1, 1988, at A15, col.1.

134. See The Asbestos Hazard Emergency Response Act, Pub. L. No. 99-519, 100 Stat. 2970 (codified at 15 U.S.C. §§ 2641-2654 (Supp. IV 1986)).

135. See *id.*

136. See *id.*

year program for addressing the problem of asbestos in public and commercial buildings. The EPA recommended, first, that more money be spent on efforts to train inspectors and cleanup technicians and, second, that tougher regulations be imposed on asbestos-removal contractors.¹³⁷

The EPA possibly has decided that due to the enormity of the asbestos-in-buildings problem, a nationwide abatement program for all public and commercial buildings would be impossible to impose. Regulation of the cleanup industry, already governed for a large part by state law,¹³⁸ seems to be the course of action that the EPA has chosen to endorse. The government apparently believes that increased public awareness and potential liability will act to motivate building owners to identify and abate asbestos.

The EPA has taken action under the Clean Air Act that affects both the owners of asbestos-contaminated buildings and the abatement industry. The EPA lists asbestos as a hazardous air pollutant under the Clean Air Act.¹³⁹ Regulations established under the Clean Air Act govern the removal of asbestos-containing material from any commercial or industrial structure or apartments with more than four units. While the requirements vary depending on the amount of asbestos involved, they apply to removal in buildings being demolished and buildings in use. Under the Clean Air Act the EPA can issue notices of violation, seek injunctions, sue for civil penalties, or bring criminal charges against violators.

Enforcement of asbestos requirements is delegated to the states, and approximately forty of these states have approved state implementation plans, which are currently in place.¹⁴⁰ Although South Carolina has been one of the most active jurisdictions in the country for asbestos property damage suits, it has been slow to develop effective asbestos-management legislation.¹⁴¹ In June 1986 the South Carolina Department of Health and Environmental Control (DHEC) promulgated "Standards of

137. *See id.*

138. *See* ASBESTOS ABATEMENT, *supra* note 22.

139. Current Standards under section 112 of the Clear Air Act are found at 40 C.F.R. §§ 61.140-.156 (1988).

140. *See* ASBESTOS ABATEMENT, *supra* note 22, at 51.

141. By 1987 thirty-two states had adopted some form of legislation regulating asbestos abatement. *See id.*

Performance for Asbestos Removal Operations.”¹⁴² The regulation set standards for asbestos-removal contractors to follow. Because the standards were only voluntary, however, DHEC could not enforce them, and soon a wide disparity of compliance with the regulation developed within the industry.¹⁴³ Finally, in December 1987 DHEC’s board of directors approved measures for licensing removal companies, for providing cleanup and disposal standards, and for record-keeping requirements.¹⁴⁴ The new measures give DHEC more authority because they require that removal companies and their employees be certified. Firms that violate these standards may have their licenses revoked or suspended.

Additional federal and state guidelines and regulations should be considered by owners of contaminated buildings or land. Although asbestos is regulated as a “non-hazardous” waste under subtitle D of the federal Resource Conservation and Recovery Act (RCRA),¹⁴⁵ many states have designated ACM waste as hazardous, and most states place stringent requirements on its disposal.¹⁴⁶ EPA has set standards for the maximum level of asbestos concentrations in drinking water.¹⁴⁷ The Occupational Safety and Health Administration (OSHA) has set both a construction and general industry standard for workplace exposure to asbestos.¹⁴⁸ Anyone involved in the abatement, removal, storage or disposal of asbestos products must be vitally aware of his responsibilities under the various state and federal regulations.

B. Contractor Abatement Problems

1. Costs

Governmental regulations have increased potential liability, and tenants’ and workers’ demands have put pressure on build-

142. S.C. CODE REGS., 61-86.1 (Supp. 1988) (effective June 27, 1986).

143. See *Asbestos cleanup companies face license standards*, The State (South Carolina), Dec. 18, 1987, at B2, col. 5.

144. See *id.*

145. 42 U.S.C. §§ 7401-7642 (1982 & Supp. II 1983).

146. See ASBESTOS ABATEMENT, *supra* note 22, at 53.

147. Maximum concentrations are set by the EPA under the Safe Drinking Water Act, 42 U.S.C. § 300g (1982).

148. For discussion of exposure limits, see ASBESTOS INFORMATION ASS’N, Bull Nos. 86-4422, 86-4423.

ing owners to abate or remove asbestos.¹⁴⁹ On the other hand, the high cost of asbestos abatement discourages owners from undertaking cleanup.

Asbestos cleanup is best accomplished through various methods, depending on the particular circumstances. The following cleanup methods may be required: (1) encapsulation, whereby ACM is coated with a sealant; (2) enclosure, whereby airtight walls or ceilings are constructed around asbestos-coated surfaces; or (3) removal, whereby ACM is removed, packed into leakproof containers, and shipped to an approved disposal site.¹⁵⁰ Although the initial cost of removal may be higher than the cost of other control measures, most building owners have found that removal may cost less in the long term than special operational practices, periodic reinspection, and repairs associated with enclosure and encapsulation.¹⁵¹ The costs of eventually removing enclosed or encapsulated materials prior to demolition also must be considered.¹⁵² While removal is the only truly permanent solution, its high cost — together with the fact that many building owners lack the cash reserves or budgetary flexibility to pay for removal work — has proven an insurmountable obstacle to removal for many owners.

Because public health is at stake, perhaps the government should intervene by providing some type of financial incentive for asbestos removal. Tax credits, matching grants, or low-interest loans might be considered. Building owners already have sufficient motivation to remove asbestos; governmental incentives might provide the financial assistance needed to undertake a serious removal program.

2. Abatement Contractors

The legal risks that face owners also apply to the asbestos-abatement contractor. The contractor is subject to being sued by employees, the owners, occupants or subsequent occupants of

149. See G. PETERS & B. PETERS, *supra* note 59, at 155.

150. See ASBESTOS ABATEMENT, *supra* note 22, at 45.

151. See EPA, GUIDANCE FOR CONTROLLING FRIABLE ASBESTOS-CONTAINING MATERIALS IN BUILDINGS 3-26 (1983).

152. The cost per square foot for asbestos removal by qualified contractors may cost anywhere from \$2.50 to \$100.00 per square foot depending on where and in what form the asbestos is contained. See *supra* note 149 and accompanying text.

the building, and even the passersby. Because of the legal exposure, abatement contractors must operate a single-purpose business. Large contracting companies generally will not risk assets from their other operations. For this reason, most abatement contractors are small and relatively new. The size, age, and inexperience of many of these companies make obtaining insurance or bonding difficult. Experience is hard to gain since few customers are willing to hire an uninsured contractor.¹⁵³

Despite governmental regulations and the best intentions of most experienced abatement contractors, a high proportion of all asbestos-removal jobs are still performed improperly. A sloppy job can severely contaminate the building and surrounding areas.¹⁵⁴ Some building owners, including government agencies, have hired contractors to perform quick "dirty" removals. Such "dirty" contractors offer no personal protection to employees who rip out asbestos, which is disposed as regular trash.¹⁵⁵ The asbestos covered "snowmen" and the "midnight cowboy" contractors have not disappeared.¹⁵⁶

While the probability of a dirty job still exists, building owners can reduce the risk of such a job by selecting a zealously scientific and highly responsible contractor. Prequalification questionnaires should be used prior to selecting an abatement contractor to determine the contractor's history of EPA citations, worker training, proposed disposal subcontractor, types of equipment, financial status, insurance coverage, and bonding limits. Recommendations and references also should be used prior to selecting an abatement contractor.¹⁵⁷

Insurance and bonding of abatement contractors should be considered but may be of little value due to the time delay of asbestos disease. Injury likely would not occur until years after both the exposure and the term of the insurance policies. Insur-

153. See G. PETERS & B. PETERS, SOURCE BOOK ON ASBESTOS DISEASES: MEDICAL, LEGAL, AND ENGINEERING ASPECTS (Supp. 1987).

154. See G. PETERS & B. PETERS, *supra* note 59, at 158.

155. See G. PETERS & B. PETERS, *supra* note 153, at 3-4.

156. See *id.* The term "snowman" has been used to describe the appearance of asbestos-removal workers who had that appearance due to their being covered head to toe with asbestos dust when improper removal techniques were used. "Midnight cowboy" refers to a contractor who would perform removals and dumpings at night to circumvent the legal requirements for these activities.

157. See Fried, *supra* note 27, at 125-27.

ance companies might hesitate to issue a policy at all. Thus, the individuals responsible for the asbestos abatement, or its delay, may find themselves individually liable.

VI. CONCLUSION

Most Americans have been exposed to asbestos in a variety of forms. Many researchers still conclude that “asbestos in building air will almost never pose a health hazard to building occupants.”¹⁵⁸ The law, however, disagrees with this opinion and requires that owners make some very hard decisions.

Great personal risk exists for those who are responsible for asbestos-contaminated commercial and public buildings, as well as to the entities that own them. Many owners can ill afford their portion of the estimated thirty-billion-dollar cleanup bill,¹⁵⁹ but the cost, nevertheless, must be incurred. Owners must adhere to a legally defined, precise sense of responsibility in bearing the cost of proper abatement. Using forethought and a rigorous, detailed program of cleanup, an owner can avoid any significant risk of civil or criminal liability, while retaining several options for seeking restitution from those who created the hazard.

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158. Cross, *Asbestos in Schools: A Remonstrance Against Panic*, 11 COLUM. J. ENVTL. L. 87 (1986).

159. See ASBESTOS ABATEMENT, *supra* note 22.